Supreme Court, U.S.
FILED
MAY 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1738

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERIE GANOE LODESTRO and CLEO GANOE SMITH

Petitioners,

v.

GEORGE F. NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF ANNETTE GANO LUMMIS, DECEASED

Respondent.

On Petition for Writ of Certiorari To The Supreme Court of the State of Texas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 1, 1986
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25pp $

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VICTOR L. GANOE, THOMAS A. GANOE,
EDWIN A. GANOE, DANIEL K. GANOE,
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CHERIE GANOE LODESTRO and
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Petitioners,

v.

GEORGE F. NEFF, INDEPENDENT EXECUTOR
OF THE ESTATE OF ANNETTE GANO LUMMIS,
DECEASED

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent George F. Neff, Administrator of the Estate of Annette Gano Lummis, Deceased, respectfully prays that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of the State of Texas dismissing Petitioners' writ of error from the Court of Appeals for the First Supreme Judicial District of Texas entered in this action on February 26, 1986.

QUESTION PRESENTED

Whether the Texas Supreme Court and the Texas Court of Appeals denied Petitioners their rights under the Fifth and Fourteenth Amendments of the United States Constitution by dismissing Petitioners' appeal herein for the reason that it was untimely filed.

TABLE OF CONTENTS

1.	Table of Authorities	iv
2.	Opinion Below	1
3.	Jurisdiction	2
4.	Provisions of Law Involved	3
5.	Statement of the Case	6
6.	Reasons for Denying the Writ	8
7.	Conclusion	15
8.	Appendix A - Lower Court Decisions	
9.	Appendix B - September 4, 1985 Letter to Grisanti from Schubert	

TABLE OF AUTHORITIES

Cases:

Blair v. Supreme Court of State of Wyoming, 671 F.2d 389 (10th Cir. 1982) 8

Daniels v. Allen, decided sub nom. Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953) 8

Farrow v. Bramble, 663 S.W.2d 893 (Tex. App. -- San Antonio 1983, no writ) 14

Foye v. Bordenkircher, 535 F.Supp. 1340 (N.D. W. Va. 1982) 8

Gaskin v. Ferritt, 472 S.W.2d 211 (Tex. Civ. App. -- Texarkana 1971, no writ) 13

Glidden Co. v. Aetna Casualty and Surety Co., 155 Tex. 591, 291 S.W.2d 315 (1956) 13

Grajeda v. Charm Homes, Inc., 614 S.W.2d 176 (Tex. Civ. App. -- El Paso 1981, no writ) 12

Heard v. Heard, 305 S.W.2d 231 (Tex. Civ. App. -- Galveston 1957, writ ref'd) 13

Lucchese v. Specia, 281 S.W.2d 725 (Tex. Civ. App. -- San Antonio 1955, writ ref'd) 14

Marsh v. United States, 435 F.Supp. 426 (W. D. Okla. 1976) 8

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(S. D. N. Y. 1978) 8
Pridgen v. Damon, 298 S.W.2d 278
(Tex. Civ. App. -- Austin 1957, writ ref'd) 13
Texas Employers' Ins. Assoc. v. Martin,
162 Tex. 376, 347 S.W.2d 916 (Tex. 1961) 13
United States ex rel. Brown v. Smith,
306 F.2d 596 (2d Cir. 1962) 8
Van Duyse v. Israel, 486 F.Supp. 1382
(E. D. Wisc. 1980) 8
Wainwright v. Torna, 455 U.S. 586,
102 S.Ct. 1300, 71 L.Ed.2d 475 (1982) 8
Young v. Kilroy Oil Co. of Texas, Inc.,
673 S.W.2d 236 (Tex. App. -- Houston
[1st Dist.] 1984, writ ref'd n.r.e.) 13
Zidell v. NHP Real Estate Co., 643 S.W.2d 199
(Tex. App. -- Austin 1982, no writ) 13

Rules

Supreme Court Rule 28.2 11
Tex. R. Civ. P. 5 10
Tex. R. Civ. P. 21(a) 11
Tex. R. Civ. P. 354(a) 9

Tex. R. Civ. P. 356(a) 9,11,12

Tex. R. Civ. P. 356(b) 12

OPINION BELOW

The Supreme Court of Texas dismissed Petitioners' application for writ of error on February 26, 1986, for want of jurisdiction. The case had been dismissed for want of jurisdiction on December 12, 1985 by the Court of Appeals, First Supreme Judicial District, Houston, Texas* from an appeal from the Order of Hon. Pat Gregory, Probate Court No. 2; Harris County, Texas, which was rendered August 30, 1985. Copies of these documents are attached in Appendix A.

* Petitioners cited the wrong Court of Appeals case in their Petition for Certiorari. The correct Court of Appeals Opinion is attached in Appendix A.

JURISDICTION

This Court does not have jurisdiction under the Fifth and Fourteenth Amendments to the United States Constitution as stated by Petitioners.

The Court of Appeals, First Supreme Judicial District, Houston, Texas on December 12, 1985 properly dismissed Petitioners' Appeal from Probate Court No. 2, Harris County, Texas, because that Appeal had not been timely filed. There being no jurisdiction in the Court of Appeals, the Texas Supreme Court properly dismissed Petitioners' application for writ of error. Petitioners failed to follow Texas appellate procedure and were not denied due process by the Texas Courts.

PROVISIONS OF LAW INVOLVED

Texas Rules of Civil Procedure, Rule 354(a):

COST BOND

Unless excused by law, the appellant shall execute a bond payable to the appellee in the sum of $1000 . . . .

Texas Rules of Civil Procedure, Rule 356(a) & (b):

TIME FOR PERFECTING APPEAL

(a) When a bond for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed . . . . (Emphasis Added).

(b) An extension of time may be granted by the appellate court for late filing of a cost bond or making the deposit required by subdivision (a) or for filing the affidavit, if such bond is filed, deposit is made, or affidavit is filed within fifteen days after the last day allowed and, within the same period, a motion is filed in the appellate court reasonably explaining the need for such extension . . . .

Texas Rules of Civil Procedure, Rule 5:

ENLARGEMENT

. . . the court . . . may not enlarge the period for taking any action under the rules relating to . . . the period for taking an appeal or writ of error from the trial court to any higher court or the period for application for writ of error in the Supreme Court, except as stated in these rules; provided, however, if . . . any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or more before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time; . . .

Texas Rules of Civil Procedure, Rule 21a:

NOTICE

. . . Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him

by mail, three days shall be added to the prescribed period

. . . .

United States Constitution, Amendments V and XIV

. . . without due process of law . . . .

STATEMENT OF THE CASE

The judgments of the Texas Supreme Court and Court of Appeals are correct.

This is a suit in which Petitioners seek to establish an interest in the Estate of the late Howard R. Hughes, Jr. by claiming that Petitioners and Howard R. Hughes, Jr. shared a remote common ancestor -- a maternal Great Great Great Great Great Great Grandfather -- by the name of Stephen Gano born in 1652 in France. On August 30, 1985, the probate court signed and entered a judgment that Petitioners take nothing on their remote claims of heirship. Petitioners did not file a motion for new trial. Though the last date for timely filing of an appeal bond was September 30, 1985, Petitioners did not file their appeal bond with the Harris County Clerk's Office until October 2, 1985. Petitioners did not file a motion for extension of time to file their appeal bond.

Respondent filed a motion to dismiss Peititioners' appeal for want of jurisdiction with the Court of Appeals for the First Supreme Judicial District sitting in Houston. The Court of Appeals granted Respondent's motion and

dismissed the appeal, correctly holding that because Petitioners failed to file their cost bond on or before September 30, 1985, the Court of Appeals had no jurisdiction over the appeal. Petitioners did not file a motion for rehearing in the Court of Appeals.

On January 20, 1986, Petitioners filed an application for writ of error in the Texas Supreme Court. That application for writ of error was dismissed by the Supreme Court on February 26, 1986 for want of jurisdiction.

REASONS FOR DENYING THE WRIT

A. There Has Been No Denial of Due Process.

Petitioners claim that Texas courts denied them due process of law by dismissing their appeal for failure to comply with the Texas Rules of Civil Procedure. There has been no denial of due process, just a lack of diligence on the part of Petitioners. The law is clear that dismissal of an appeal on the grounds that it was not timely filed does not violate the "due process" clause of the Fourteenth Amendment. Wainwright v. Torna, 455 U.S. 586, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982); Daniels v. Allen, decided sub nom. Brown v. Allen, 344 U.S. 443, 486, 73 S. Ct. 397, 422, 97 L. Ed. 469, 504 (1953) (filing one day late); United States ex rel. Brown v. Smith, 306 F. 2d 596, 604-606 (2d Cir. 1962); Blair v. Supreme Court of State of Wyoming, 671 F. 2d 389, 391 (10th Cir. 1982); Micelli v. LeFevre, 444 F. Supp. 1187, 1191 (S.D. N.Y. 1978); Marsh v. United States, 435 F. Supp. 426, 429 (W.D. Okla. 1976); Foye v. Bordenkircher, 535 F. Supp. 1340 (N.D. W. Va. 1982); Van Duyse v. Israel, 486 F. Supp. 1382, 1388-1389 (E. D. Wisc. 1980).

Pursuant to authority granted it by the state legislature, the Texas Supreme Court has promulgated rules of civil procedure rationally designed to ensure the fair and efficient administration of justice in Texas state courts. The rule providing a thirty day time period for filing an appeal bond is rationally designed to promote the fair and effficient administration of justice. Thus, enforcement of the rule is not unconstitutional.

B. Petitioners' Appeal Bond Not Timely Filed.

Rule 354(a) of the Texas Rules of Civil Procedure requires a party appealing to the Court of Appeals to file an appeal bond with sufficient surety. Since Petitioners did not file a motion for new trial, in order to timely perfect their appeal, Petitioners were required under Rule 356(a) of the Texas Rules of Civil Procedure to file their appeal bond within thirty days after the date the judgment was signed. After a fair trial on the merits, the Probate Court signed and filed its judgment on August 30, 1985. This made September 30, 1985 the last day upon which Petitioners' appeal bond could be timely filed. The appeal bond, as shown on its face by the clerk's date stamp, was

not filed by Petitioners until October 2, 1985. The appeal bond was not timely filed.

C. Rule 5 Enlargement Period Not Available for Petitioners.

Rule 5 of the Texas Rules of Civil Procedure[1] allows an appellant a ten day grace period for filing his appeal only if the appeal bond (i) is sent to the proper clerk by first-class U.S. mail in a properly addressed and stamped envelope deposited in the mail one day or more before the last day for filing the appeal bond and (ii) is received by the clerk not more than ten days tardily. Petitioners are unable to avail themselves of this additional ten day period because the appeal bond was neither sent to nor received by the clerk via the U.S. mails. Instead, the appeal bond was delivered by private courier. Rule 5

---

[1] In their petition for certiorari, Petitioners have quoted an irrelevant portion of Rule 5 and have left out the only relevant parts. The portion they cite does not apply in appeals cases. The relevant portion of the rule is set forth in Respondent's Provisions of Law Involved, p. 3.

strictly requires that the U.S. mails be used, just as the Supreme Court requires that the U.S. mails be used to comply with Supreme Court Rule 28.2. Petitioners' hand delivery was too late and was properly held not to come within the rule.

D. Rule 21(a) Does Not Afford Additional Time to File an Appeal Bond.

Petitioners' contention that Rule 21(a) of the Texas Rules of Civil Procedure affords them three additional days to file their appeal bond is wholly without merit. Rule 21(a) applies only when a party must take some act within a prescribed time period after receipt of a notice or other paper served on him. Tex. R. Civ. P. 21(a). Under Rule 356(a), an appellant's time to file an appeal bond does not run from his receipt of a notice or other paper, but rather from the date the trial court's judgment is signed. Tex. R. Civ. P. 356(a). It is therefore clear that Petitioners' reliance on the general notice rule, Rule 21(a), is misplaced. Although actual notice of the date of signing is irrelevant, Petitioners' attorney, Richard D. Grisanti, did receive a letter from counsel for Respondent, Thomas L. Schubert, dated September 4, 1985 which specifically stated that the Probate Court judgment was signed by

Judge Gregory on August 30, 1985. Appendix B. Thus, Petitioners actually knew when the judgment was signed at least 25 days before the appeal bond was due, and Petitioners' failure to follow the Texas Rules was inexcusable, and no excuse has been proffered.

E. Petitioners Failed to File a Motion for Extension of Time.

Rule 356(b) of the Texas Rules of Civil Procedure provides that an extension of time may be granted by a court of appeals for the late filing of an appeal bond only if the bond and a motion reasonably explaining the need for a time extension are filed with the court of appeals within fifteen days after the last day allowed for filing the appeal bond. Since the last day for filing an appeal bond was September 30, 1985, the last day for filing a motion for extension of time was October 15, 1985, and no such motion was filed by that date or ever. Petitioners' failure to timely file the bond or move for an extension within said fifteen day period returns Petitioners to the original time limits of Rule 356(a), which time limits are jurisdictional under Texas law. Grajeda v. Charm Homes, Inc., 614 S. W. 2d 176, 177 (Tex. Civ. App. -- El Paso 1981, no writ).

F. Petitioners' Failure to Timely File Appeal Bond is Jurisdictional Defect.

It is well settled in Texas law that it is incumbent upon the appellant to make absolutely sure that the appeal bond has been timely filed, or be able to show that it was timely placed in the U.S. mails. Gaskin v. Perritt, 472 S.W. 2d 211 (Tex. Civ. App. -- Texarkana 1971, no writ). In addition, the timely filing of the appeal bond must affirmatively appear from the record. Heard v. Heard, 305 S.W. 2d 231, 234 (Tex. Civ. App. -- Galveston 1957, writ ref'd).

The timely filing of Petitioners' appeal bond is mandatory and jurisdictional under Texas law. Glidden Co. v. Aetna Casualty and Surety Co., 155 Tex. 591, 291 S.W. 2d 315, 318 (1956); Young v. Kilroy Oil Co. of Texas, Inc., 673 S.W. 2d 236 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.). The failure to file timely an appeal bond creates a jurisdictional defect in the appeal, Texas Employers' Ins. Assoc. v. Martin, 162 Tex. 376, 347 S.W. 2d 916 (Tex. 1961); Zidell v. NHP Real Estate Co., 643 S.W. 2d 199, 200 (Tex. App. -- Austin 1982, no writ); Pridgen v. Damon, 298 S.W. 2d 278 (Tex. Civ. App. -- Austin 1957, writ ref'd), and requires the dismissal of the

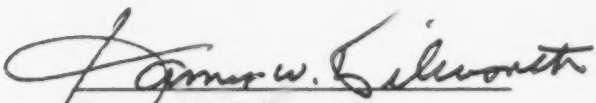
appeal. Farrow v. Bamble, 663 S.W. 2d 893 (Tex. App. -- San Antonio 1983, no writ); Lucchese v. Specia, 281 S.W. 2d 725, 726 (Tex. Civ. App. -- San Antonio 1955, writ ref'd).

In dismissing Petitioners' appeal for want of jurisdiction, the Texas Court of Appeals and the Texas Supreme Court simply applied the Texas Rules of Civil Procedure as they are written and clearly applied by the Courts. The rules of appellate procedure are strictly applied, and they affect all appellants alike. Petitioners' complete disregard of the Texas appellate procedure brings no constitutional issue before this Court.

CONCLUSION

Respondent respectfully submits that this case is not a proper one for review by certiorari in the Supreme Court of the United States, and Respondent prays that the petition for Writ of Certiorari be denied.

Respectfully submitted,



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4200 Texas Commerce Tower
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(713) 220-4200

Attorneys for Respondent
George F. Neff, Executor
of the Estate
of Annette Gano Lummis,
Deceased

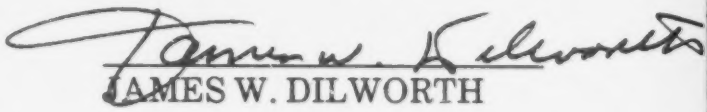
Of Counsel for Respondent:
Thomas L. Schubert
ANDREWS & KURTH
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200

PROOF OF SERVICE

James W. Dilworth, Andrews & Kurth, deposes and states that pursuant to Rule 28.3 of this Court he served this Brief in Opposition to Writ of Certiorari on the Petitioners by enclosing three copies of each thereof in an envelope, certified mail, return receipt requested, addressed to:

Richard D. Grisanti
577 Niagara Street
Buffalo, New York 14201

and depositing the same in the United States mails at Houston, Texas on the 1st day of May, 1986.



JAMES W. DILWORTH

APPENDIX A

P.O. BOX 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

February 26, 1986

Mr. Richard D. Grisanti
577 Niagara Street
Buffalo NY 14201

Mr. Thomas L. Schubert
Andrews & Kurth
4200 Texas Commerce Tower
Houston TX 77002

RE: Case No. C-4953

STYLE: VICTOR L. GANOE ET AL.
v. GEORGE F. NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF

Dear Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the application for writ of error in the above referenced case.

Respectfully yours,

Mary M. Wakefield, Clerk

By Blanca E. Trevino
Deputy

BEST AVAILABLE COPY

COPY OF JUDGMENT

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERIE GANOE LODESTRO, AND CLEO GANOE SMITH, APPELLANTS

Appeal from the Probate Court No. 2 of Harris Cty, Tx. (Tr. Ct. No. 139,362).

NO. 01-85-0896-CV V.

GEORGE F. NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF ANNETTE GANO LUMMIS, DECEASED, APPELLEE

On this day came on to be considered the appellee's motion to dismiss, and the same having been duly considered and found meritorious, it is therefore **CONSIDERED, ADJUDGED AND ORDERED** that said motion be granted, and that the appeal herein be, and the same hereby is, dismissed.

It is further ordered that the appellants, VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERIE GANOE LODESTRO, AND CLEO GANOE SMITH, and their surety, LAWYERS SURETY CORPORATION, jointly and severally, pay all costs incurred by reason of this appeal.

It is further ordered that this decision be certified below for observance.

Judgment rendered by panel consisting of Associate Justices Smith, Duggan, and Hoyt.

JDGGAN.JN

OPINION

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERIE GANOE LODESTRO, AND CLEO GANOE SMITH, APPELLANTS

NO. 01-85-0896-CV V.

GEORGE F. NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF ANNETTE GANO LUMMIS, DECEASED, APPELLEE

On Appeal from the Probate Court No. 2 of Harris County, Texas
Trial Court Cause No. 139,362

BEST AVAILABLE COPY

This is an appeal from a suit to establish an interest in the estate of the late Howard R. Hughes, Jr. Appellee has filed a motion to dismiss for want of jurisdiction.

The judgment was signed on August 30, 1985, and no motion for new trial was filed. In order to perfect the appeal, the cost bond was due to be filed on September 30, 1985. Tex. R. Civ. P. 356(a). The bond was filed on October 2, 1985. No motion for extension of time to file the cost bond was filed. Rule 356(b).

In the absence of a properly filed cost bond, we may only dismiss the appeal. See, e.g., Young v. Kilroy Oil Co. of Texas, 673 S.W.2d 236 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

The appellee's motion is granted, and the appeal is dismissed.

PER CURIAM

Panel consists of Associate Justices Smith, Duggan, and Hoyt.

No publication. Tex. R. Civ. P. 452.

OPGAN.KE

Judgment rendered and opinion filed December 12, 1985.

A TRUE COPY ATTEST:

Kathryn Cox
Clerk of the Court

442837

PROBATE COURT NO. 2

NO. 139,382

IN RE ESTATE OF	§	IN THE PROBATE	665-01-0930
	§		
HOWARD R. HUGHES, JR.	§	COURT NO. 2	
	§		
DECEASED	§	OF HARRIS COUNTY, TEXAS	

JUDGMENT

BE IT REMEMBERED that on the 2nd day of August, 1985, came on to be heard the Motion to Set Aside Determination of Heirship filed on behalf of Movants, Victor L. Ganoe, Thomas A. Ganoe, Edwin A. Ganoe, Daniel K. Ganoe, Sandra L Ganoe Collar, Mary Ganoe Price, Cherie Ganoe LoDestro and Cleo Ganoe Smith, all of whom appeared by and through their attorney of record, Mr. Richard D. Grisanti, and Victor L. Ganoe appeared personally and further came the Respondent, George F. Neff, Independent Executor of the Estate of Annette Gano Lummis, Deceased, by and through his attorney of record;

And the Court after considering the motion as well as the response thereto including affidavits, responses to interrogatories, responses to requests for admissions, briefs and arguments of counsel and the entire record in this cause, finds that the Movants had actual notice of the Texas heirship trial and that the Movants did not receive statutory notice of the Texas heirship trial;

Accordingly, the Court orders that the maternal heirship proceeding be re-opened for the sole and limited purpose only of determining whether the Movants have a claim under the Texas heirship statutes that is superior to those persons previously determined to be maternal heirs in this Court's Judgment respecting heirship dated November 13, 1981.

BEST AVAILABLE COPY

CERTIFIED COPY CERTIFICATE
STATE OF TEXAS
COUNTY OF HARRIS

The above is a full, true and correct photographic copy of the original record now in my lawful custody and possession, as the same is recorded in the Official Public Records of Probate Courts in my office and Preserved on Microfilm, and having Microfilm Identification Number as stamped thereon. I hereby certify on

SEP 3 1965

ANITA RODEHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS
By Karen Harrison
Deputy

KAREN HARRISON

665-01-C931

And further then came on to be heard the Motion for Summary Judgment filed by George F. Neff, Independent Executor of the Estate of Annette Gano Lummis, Deceased, against Victor L. Ganoe, Thomas A. Ganoe, Edwin A. Ganoe, Daniel K. Ganoe, Sandra I. Ganoe Collar, Mary Ganoe Price, Cherie Ganoe LoDestro and Cleo Ganoe Smith regarding their claim of heirship;

It appearing to the Court that the motion for summary judgment having been made in proper form and time and that proper service of said motion has been made, and the Court having considered the summary judgment proof herein including the motion, reply thereto, the response to the reply, the pleadings, the depositions, answers to interrogatories, admissions and affidavits on file herein as well as the argument of counsel, the Court finds and concludes that there is no genuine issue of any material fact and that movant is entitled to judgment as a matter of law.

It is therefore ORDERED, ADJUDGED AND DECREED that Victor L. Ganoe, Thomas A. Ganoe, Edwin A. Ganoe, Daniel K. Ganoe, Sandra I. Ganoe Collar, Mary Ganoe Price, Cherie Ganoe LoDestro and Cleo Ganoe Smith take nothing on their claims of heirship, and costs applicable to such claims are hereby taxed against them.

SIGNED this the 30 day of August, 1985.

JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

RICHARD D. GRISANTI
577 Niagara Street
Buffalo, New York 14201

ATTORNEY FOR GANOES

FILED
1985 AUG 30 AM 9:33
COUNTY CLERK
HARRIS COUNTY, TEXAS

-2-

CERTIFIED COPY CERTIFICATE
STATE OF TEXAS
COUNTY OF HARRIS

The above is a full, true and correct photographic copy of the original record now in my lawful custody and possession, as the same is recorded in the Official Public Records of Probate Courts in my office and Preserved on Microfilm, and having Microfilm Identification Number as stamped thereon. I hereby certify on

SEP 3 1965

ANITA RODEHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS
By Karen Harrison
Deputy

KAREN HARRISON

BEST AVAILABLE COPY

655-01-0952

Thomas L. Schubert

THOMAS L. SCHUBERT
TBA No. 17821000
Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002

ATTORNEYS FOR GEORGE F. NEFF,
Independent Executor of the
Estate of Annette Gano Lummis, Deceased

BEST AVAILABLE COPY

CERTIFIED COPY CERTIFICATE
STATE OF TEXAS
COUNTY OF HARRIS

The above is a full, true and correct photographic copy of the original record now in my lawful custody and possession, as the same is recorded in the Official Public Records of Probate Courts in my office and Preserved on Microfilm, and having Microfilm Identification Number as stamped thereon. I hereby certify on

SEP 3 1985

COUNTY COURT OF HARRIS COUNTY, TEXAS

ANITA RODEHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS
By Karen Harrison
Deputy

KAREN HARRISON